Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.) *and* Sidney J. Tompkins, An Individual. Case 9–CB–10964

March 14, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 21, 2004, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(b)(1)(A) of the Act by failing to obtain the Employer's compliance with an arbitrator's award, thus allowing the Charging Party's right to enforcement of the award to lapse. The Respondent contends that the complaint is time-barred under Section 10(b) of the Act, and that its conduct did not violate Section 8(b)(1)(A). We find that the Respondent has raised a valid affirmative defense by showing that the Charging Party had clear and unequivocal notice before the 6-month limitations period that the Respondent would not seek to enforce the Charging Party's arbitration award. Accordingly, we shall reverse the judge's decision and dismiss the complaint without reaching the merits of the unfair labor practice allegation.

I. FACTS

The Charging Party, a journeyman carpenter, worked for the Employer from September 1979 to November 1997, when he was terminated for allegedly sabotaging an OSHA-mandated air quality test. Respondent filed a grievance on the Charging Party's behalf and took the same to arbitration, where the Respondent was represented by Attorney John Doll. On February 27, 1999, the arbitrator found the Employer did not have just cause for discharging the Charging Party and ordered that he be reinstated and made whole. However, because the record did not indicate the Charging Party's postdischarge earnings, the arbitrator left the make-whole remedy up to the parties.

The open-ended award led to an exchange of several letters between counsels for the Respondent and the Employer between May 24 and September 11, 1999. The Employer's counsel repeatedly asked for the Charging Party's financial data, some of which was provided by the Respondent. The last letter, dated September 11, 1999, was a request by the Employer's counsel for additional financial documents. The Respondent stipulated there was no reply to the letter and no communication at all between the Respondent and the Employer regarding the Charging Party's award between September 11, 1999 and October 2, 2001, when Respondent Attorney Peter Fox wrote to Employer Attorney Thomas Harrington regarding the Charging Party's award.

The Charging Party testified, without dispute, that he continually contacted the Respondent's representatives to have the award enforced, and that he was told by the Respondent's lawyers that the process would take some time before the parties could agree. Specifically, from spring 1999 to early 2000, the Charging Party frequently spoke with Respondent Representative George Long, checking with him to see if he could go back to work for the Employer. At some point in early 2000, Long specifically told the Charging Party that the Respondent did not intend to enforce the arbitration award because the Employer did not want to reinstate the Charging Party, and the Respondent was concerned about the costs of another arbitration if the Charging Party went back to the Employer and was terminated again.

On February 25, 2000, the Charging Party sent a letter to the Board complaining that his arbitration award had not been enforced and that the Respondent had refused to enforce the award. In that letter, the Charging Party requested that the Board investigate the Employer. However, the Charging Party concedes that he did *not* file a charge against the Respondent at that time because he was concerned that he would be "blackballed" by the Respondent. In March 2000, the Board responded, dismissing the Charging Party's charge[1] against the Employer because the arbitration award would make the Charging Party whole. Also in March 2000, Long told the Charging Party to stop calling Attorney Doll, as it was costing the Respondent too much money.

The Charging Party acknowledged that, after this time, he did not speak to any Respondent representative about

[1] The record does not include either the Charging Party's letter to the Board or the Board's reply. Instead, the record includes the Charging Party's testimony and a "timeline" he developed at the request of the Respondent's counsel in June 2003. From the record evidence developed, it appears that the Region treated the Charging Party's letter as a charge against the Employer, but not against the Respondent, consistent with the Charging Party's testimony about his intent.

enforcing the award until December 2000, when he contacted several officials of Respondent about the award. Later that month, Respondent Attorney Tom Kircher began working on the Charging Party's case. Kircher told the Charging Party that he represented the Respondent and that his primary concern was protecting the Respondent. Kircher also asked whether the Charging Party had filed a lawsuit against the Respondent. The Charging Party indicated that he had not, and asked whether there was a 1-year statute of limitations for enforcing arbitration awards. Kircher said he did not think there was a 1-year limitations period for enforcing arbitration awards, but that he would find out and get back to the Charging Party.[2] Kircher again met with the Charging Party later in December, and requested additional financial information from the Charging Party.

In early 2001, Kircher turned the Charging Party's case over to Respondent Attorney Fox,[3] who met with the Charging Party at Respondent's offices several times over the next few months. During those meetings, the Charging Party repeatedly raised the issue of the statute of limitations, but was never given a definitive response.

Fox eventually wrote to Employer Attorney Thomas Harrington on October 2, 2001, indicating the Respondent wanted the Charging Party reinstated and the backpay issues resolved. Harrington replied on October 29, 2001, that the Employer would consider the Respondent's proposals, but maintained that Respondent had allowed the Charging Party's enforcement rights to lapse. The Respondent sued the Employer in Federal district court on November 30, 2001, seeking to enforce the Charging Party's award. On April 11, 2003, the court granted the Employer's Motion for Summary Judgment on the ground that the Respondent's claim for enforcement was time-barred by Ohio's 1-year statute of limitations on the enforcement of arbitration awards.

After the district court issued its decision, the Charging Party called Fox, who instructed the Charging Party to call Respondent Attorney Marcus, for whom the Charging Party left several messages. In May 2003, the Charging Party finally spoke with Marcus, who informed the Charging Party that it would be a waste of time and money to appeal the decision. Marcus added that it was unfortunate that someone had "dropped the ball," but that attorneys have insurance to protect against such occurrences.

On July 21, 2003, Marcus wrote to the Charging Party, thanking him for sending information relating to his original grievance but indicating that the Respondent was not in a position to take any further action regarding the Charging Party's grievance. Marcus also advised the Charging Party that he had reviewed the information and had concluded that the Respondent's failure to successfully enforce the arbitration award did not constitute a breach of the duty of fair representation. Marcus also stated "[w]hile the delays that occurred were regrettable and may have ultimately led to the dismissal of the action to enforce the arbitration award, the conduct of the [Respondent] and its attorneys does not constitute the type of misconduct the law recognizes as actionable," as "[t]he [Respondent's] conduct does not constitute anything more than mere negligence." Finally, Marcus advised the Charging Party that he was entitled to pursue the matter further by filing an unfair labor practice charge with the Board. The Charging Party did so on August 5, 2003.

II. THE JUDGE'S DECISION

The administrative law judge found that the Charging Party knew on February 25, 2000 that the Respondent said it was not going to pursue his award any further because of the costs of time and money, and the Charging Party did nothing regarding his claim between February and December 2000. Thus, the 6-month period provided by Section 10(b) of the Act would have extinguished any unfair labor practice charge raised by the Charging Party against the Respondent after August 25, 2000. However, the judge ultimately rejected the Respondent's 10(b) affirmative defense, reasoning that the Respondent revived the Charging Party's unfair labor practice cause of action by its efforts on behalf of the Charging Party between December 2000 and July 2003. For the reasons discussed below, we disagree with the judge on this issue. We instead find that Respondent satisfied its burden by showing the Charging Party was on notice of the alleged unfair labor practice as early as February 25, 2000, well outside the 6-month limitations period provided by Section 10(b). Because the charge here was not filed until August 2003, we find that Section 10(b) bars the charge and therefore dismiss the complaint.[4]

[2] Doll had previously informed the Charging Party that the 1-year period did not begin to run until the Employer indicated in writing that it would not abide by the award.

[3] Kircher and Fox worked for the same law firm at all relevant times. Doll and Respondent Attorney Marcus each worked for separate law firms.

[4] Chairman Battista concludes that the 10(b) period began on the date, prior to February 25, 2000, when Respondent Representative Long specifically told the Charging Party that the Respondent would not enforce the arbitration award. On February 25, the Charging Party complained about that refusal, but the refusal itself occurred on the earlier date. However, Chairman Battista agrees that, whichever date is chosen, the conduct occurred before the 10(b) period.

III. DISCUSSION

Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). This limitations period does not begin to run until the charging party has "clear and unequivocal notice," either actual or constructive, of a violation of the Act. *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence. *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001) (applying Sec. 10(b) where a charging party was found to have been "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred"). The burden of showing notice is on the party raising the affirmative defense of Section 10(b). *Chinese American Planning Council*, 307 NLRB 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993).

Board precedent provides that the 10(b) period begins to run when the Charging Party first has "'knowledge of the facts necessary to support a ripe unfair labor practice.'" *St. Barnabas Medical Center*, 343 NLRB No. 119, slip op. at 3 (2004) (quoting *Leach Corp.*, supra); see also *Linden Maintenance Corp.*, 280 NLRB 995, 996 (1986) (indicating that the 10(b) period began to run on an unfair representation claim when an employee was clearly informed that his grievance would be abandoned). In this case, the underlying unfair labor practice at issue is the Respondent's alleged breach of its duty to fairly represent the Charging Party, based on its handling of the Charging Party's grievance. Thus, the 10(b) period would have begun to run when the Charging Party had actual or constructive notice that the Respondent arbitrarily or perfunctorily handled his grievance. *Linden Maintenance Corp.*, supra at 996.

In this case, although the judge initially considered that the 6-month period provided by Section 10(b) began running by February 25, 2000 (and thus expired on August 25, 2000), he nonetheless concluded that the Respondent resuscitated or revived the Charging Party's claim when it renewed its efforts to enforce the award in December 2000. This novel theory—offered without any citation to authority—is not supported by precedent, and even the General Counsel does not rely on it in his Answering Brief. Instead, the General Counsel points to July 21, 2003, as the date on which the 10(b) period began running, as that was the date the Charging Party received final notice that the Respondent would not take further action on his grievance. Neither theory survives scrutiny.

Unfortunately for his unfair labor practice claim, the Charging Party was told that the Respondent would not seek enforcement of his award, and he acknowledged as much in late February 2000, when he contacted the Board to request an investigation of the Employer. Significantly, the Charging Party also knew that he *could* file a charge with the Board against the Respondent. Although this avenue was open—and would have doubtlessly avoided any issues with Section 10(b)—the Charging Party acknowledged that he did not file a charge against the Respondent out of fear that he would be "blackballed" by the Respondent.[5]

The essential issue that is before us—when the 10(b) period began running and when the 10(b) period ended—turns on the facts and not the equities. Because the Charging Party was on notice by late February 2000 that the Respondent would not seek enforcement of his arbitration award, we find the 10(b) period began to run on his unfair representation claim at that time. For more than 9 months thereafter, the Charging Party acknowledged he did not approach *any* representative of the Respondent about enforcing his award, nor did the Respondent give the Charging Party *any* indication that it would seek to enforce the award despite its earlier representation to the contrary. It was not until December 2000, when the Charging Party again approached the Respondent about enforcing the award, that Respondent gave any signal that it would expend additional resources on the Charging Party's arbitration award. As all of the Respondent's post-December 2000 efforts occurred more than 6 months *after* the Charging Party was on notice that the Respondent would not seek to enforce the award, those efforts could not revive or resuscitate an unfair labor practice claim that accrued nearly a year before. See *Harris v. Crown Zellerbach Corp.*, 629 F. Supp. 687, 689 (E.D. Mo. 1986) (holding Sec. 10(b) barred plaintiffs' hybrid § 301/fair representation claim as "the subsequent actions of the union or the plaintiffs could not thereafter revive plaintiffs' cause of action"), affd. mem. 822 F.2d 1092 (8th Cir. 1987). Phrased differently, the Respondent's actions after December 2000 do not refute the fact that the Charging Party was on clear and unequivocal notice as of February 2000 that the Respondent would not seek to enforce the award. Although the Respondent belatedly filed a suit on April 11, 2003, to enforce the award, the Respondent's filing does not rectify that it unambiguously informed the Charging Party that it would not seek enforcement of the award and the Respondent took no action inconsistent with this refusal for

[5] There is no evidence, apart from his uncorroborated testimony, to support a reasonable fear on the part of the Charging Party.

more than 6 months. For these same reasons, we cannot agree with the General Counsel that the Charging Party did not have notice that the Respondent would not enforce his arbitration award until July 2003.

While we are sympathetic to the Charging Party's plight, Section 10(b), which represents the considered judgment of Congress as to the appropriate limitations period for initiating a charge, dictates that we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 14, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I concur in the dismissal of the complaint.

Dated, Washington, D.C. March 14, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Eric Oliver, Esq., for the Government.[1]

Fred Seleman, Esq. and *Jacqueline Schuster Hobbs, Esq.*, for the Union.[2]

Sidney J. Tompkins, Pro Se.[3]

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a failure to fairly represent case. At the close of a 2-day trial in Cincinnati, Ohio, on March 24, 2004, and after hearing closing argument by Government and union counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons stated by me on the record at the close of trial, I found Ohio and Vicinity Regional Council of Carpenters (the Union) violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by failing from September 9, 1999 until May 13, 2003, to obtain The Schaefer Group, Inc.'s (herein Employer) compliance with an arbitrator's February 27, 1999 award, requiring the Employer to reinstate and make whole Charging Party Tompkins for his November 17, 1997 discharge by the Employer. I concluded the Union perfunctorily and willfully allowed Charging Party Tompkins' right to force the Employer to comply with the arbitrator's award to lapse. I rejected the Union's various defenses: that it had valid reasons for its actions, that it cost too much and required to much time, that the statute of limitations set forth in Section 10(b) of the Act barred the action herein, or, that its lack of action constituted nothing more than mere negligence that did not rise to the level of a violation of the Act.

I certify the accuracy of the portion of the transcript, as corrected,[4] pages 171 to 195 containing my Bench Decision and I attach a copy of that portion of the transcript, as corrected, as Appendix A.

CONCLUSIONS OF LAW

Based on the record, I find the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find the Union is a labor organization within the meaning of Section 2(5) of the Act and that it violated the Act in the manner and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Union has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Union, within 14 days of the Board's Order, make Charging Party Tompkins whole, with interest, for any loss of earnings and other benefits suffered as a result of his discharge by the Employer on November 17, 1997, until such time as the Employer reinstates him or he obtains other substantially equivalent employment elsewhere. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Union, Ohio and Vicinity Regional Council of Carpenters, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to fairly represent unit employees by allowing the time to lapse for enforcement of arbitral awards.

(b) In any like or related manner restraining or coercing employees in the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order make Sidney J. Tompkins whole, with interest, for any losses he may have suffered by reason his discharge on November 17, 1997, by The Schaefer Group Inc., until such time as he is reinstated by

[1] I shall refer to counsel for General Counsel as the Government.

[2] I shall refer to the Respondent as the Union.

[3] I shall refer to the Charging Party as Charging Party Tompkins, Tompkins, or Charging Party.

[4] I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment Appendix C (omitted from publication).

the Employer or he obtains other substantially equivalent employment elsewhere, in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Regional Director of Region 9 post at its business office and all other places where notices to members are posted copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C. April 21, 2004

APPENDIX A

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JUDGE'S BENCH DECISION

March 24, 2004

This is my decision in Ohio and Vicinity Regional Council of Carpenters, herein Union, and Charging Party, Sydney J. Tompkins, an individual, herein Tompkins, or Charging Party, or Charging Party Tompkins, in Case 9–CB–10964.

Tompkins filed his original charge on August 5, 2003, and amended it on November 3, 2003. The issue presented is whether the Union allowed Tompkins' right to force his Employer, the Schaeffer Group, Inc., herein Employer, to comply with an arbitrator's award requiring the Employer to reinstate and make Tompkins whole to lapse by perfunctory and willful conduct on its, the Union's, part.

If it is determined such to be the case, it is alleged the Union's actions, or lack thereof, constituted a failure to represent Tompkins for reasons that are unfair, arbitrary, invidious, and in breach of its fiduciary duty, and as such, violates Section 8(b)(1)(A) of the National Labor Relations Act, as amended herein Act.

The Union has raised an additional defense to these proceedings, setting in issue the matter of whether this case is barred by Section 10(b) of the Act, which is the statute of limitations contained in the Act.

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Upon the entire record, including my observation of the demeanor of the two witnesses, Tompkins and Attorney Fox, who testified herein, and after considering the closing statements made by Government counsel and Union counsel, I make the following:

The Employer is a corporation with an office and place of business located in Dayton, Ohio, where it is engaged in the construction and installation of industrial furnaces, and the sale of related material and furnace parts.

During the 12 months ending December 29, 2003, a representative period, the Employer purchased and received goods valued in excess of $50,000 at its Dayton, Ohio facility directly from points outside the state of Ohio.

It is alleged, the parties admit, the evidence establishes, and I find the Employer is engaged in commerce within the meaning of Section 2(2)[,](6) and (7) of the Act.

The evidence establishes, the parties admit, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted that Carpenters Local 104, herein Local 104, at times material herein, has been the authorized and designated representative of the Union with respect to various aspects of collective bargaining for a unit of employees at the Employer's Dayton, Ohio facility, and the

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Employer has recognized Local 104 as said representative.

Local 104 business agent, Darryl Hinkle, Local 104 business agent, George Long, Local 104 organizer, Scott Springer, executive secretary, Greg Martin, paralegal Dave Monger, and organizer Jim Long are admittedly agents of the Union within the meaning of Section 2(13) of the Act.

For a number of years, until 2001, by virtue of Section 9(a) of the Act, the Southwest Ohio District Council of Carpenters, United Brotherhood of Carpenters, and Joiners of America, AFL–CIO, herein, the Southwest Ohio District Council, was the exclusive collective bargaining representative of the following employees of the Employer, herein called The Unit: Included all journeyman carpenters, foremen carpenters, and apprentice carpenters at the Employer's Dayton, Ohio, and Tipp City, Ohio plants, but excluding all office clerical employees, technical employees, guards, professional employees, and supervisors, as defined in the Act.

Since at least 2001, the Union became the successor in interest to the Southwest Ohio District Council. At all times material herein, by virtue of Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the employees of the Employer in the unit just described.

At all times material herein, the Union, the

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Southwest Ohio District Council, the Union's predecessor, and the Employer have maintained and enforced a Collective Bargaining Agreement covering conditions of employment of the Unit, and containing, among other provisions, a grievance and arbitration procedure.

Charging Party Tompkins is a journeyman carpenter who has worked, with some layoffs, for the Employer from September 1979 until approximately November 5 or 6, 1997, when he, along with another employee, was suspended by the Employer.

The reason asserted by the Employer for the Charging Party's and his co-worker's discharge was sabotaging an Occupational Safety Health Administration-related air quality test.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

On or about November 17, 1997, the Charging Party and his co-worker were discharged. Thereafter, the Union filed a grievance on behalf of Charging Party Tompkins and his co-worker, which was, with certain intermediate steps, waived or bypassed, taken to arbitration.

The Union retained attorney John R. Doll to represent it at the arbitration before Arbitrator John J. Murphy. The Employer was represented by its attorney, Janet K. Cooper.

In his award handed down on February 27, 1999, Arbitrator Murphy found the Employer had just cause for

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discharging Tompkins's co-worker, but concluded the Employer did not have just cause for discharging Charging Party Tompkins. Arbitrator Murphy ordered that Tompkins be "reinstated and made whole."

Arbitrator Murphy pointed out that the Union had observed, at the arbitration hearing, that it was able to find employment in the construction industry quickly after Tompkins' discharge, but the record did not detail Tompkins' earnings subsequent to his discharge. For that reason, Arbitrator Murphy ordered "The assessment of the make whole remedy is left to the parties."

The open-endedness of the award gave rise to an exchange of letters between the Employer's counsel and counsel for the Union between the period of May 24, 1999 and September 11, 1999.

For example, the Employer's counsel wrote Union counsel on May 24, 1999 noting he was ready to discuss the Arbitrator's award whenever Union counsel was in a position to do so.

On June 25, 1999, then counsel for the Union, Doll, provided Employer counsel, Thomas J. Harrington, certain documents related to Charging Party Tompkins, and asked for a discussion after the documents had been reviewed.

On July 15, 1999, Employer counsel Cooper

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expressed disagreement with Charging Party Tompkins' assessment of back pay owed, and asked the Union to provide certain W-2 Forms for Tompkins, as well as certain pay statements and paycheck stubs for him.

Then Union counsel Doll provided Employer counsel Cooper certain of the requested documents in a letter dated September 3, 1999.

On September 11, 1999, Employer counsel Cooper again asked that certain additional information be provided, and that other previously provided wage information, in summary form, be confirmed.

The parties stipulated that was the last communication between Union counsel and the Employer until October 2, 2001. Stated differently, the parties stipulated that there was no communication between the Employer and Union counsel regarding Tompkins's arbitration award from September 11, 1999 until October 2, 2001.

On October 2, 2001, newly retained Union counsel, Peter Fox, wrote Employer attorney Thomas J. Harrington, stating he had been retained to pursue compliance with Arbitrator Murphy's award regarding Charging Party Tompkins.

Union counsel Fox also advised the Employer it was his understanding, after speaking with former Union counsel Doll, that the Employer was willing to reinstate Tompkins, as called for by Arbitrator Murphy's award, but

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that the Employer wanted to reach an agreement on the amount of back pay and lost benefits. Then Union attorney Fox noted no agreement had been reached on back pay.

Attorney Fox requested Employer's counsel review the matter, and indicated the Union was still willing to attempt to reach a settlement on back pay and lost benefits, but requested Tompkins be reinstated immediately while they worked out back pay and lost benefits.

By letter dated October 29, 2001, one of the Employer's attorneys, Joseph Wessendarp, advised then Union counsel Fox that at no time did the Employer ever agree to reinstate Tompkins as Arbitrator Murphy had awarded.

The Employer's attorney advised then Union counsel Fox that the Employer considered the right of the Union and/or Charging Party Tompkins to seek enforcement of Arbitrator Murphy's award was time barred, and that the Employer was fully prepared to defend itself on that point.

The Employer's counsel observed that any prior failure to reach an agreement on back pay was predicated on the fact that the Union and Tompkins could never agree on the issue and means of resolving the back pay dispute.

On November 30, 2001, the Union filed suit in the United States District Court for the Southern District of Ohio Western Division pursuant to Section 301 of the Labor Management Relations Act, 29 USC

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Section 185, requesting that the Court enforce Arbitrator Murphy's award as it pertained to Charging Party Tompkins.

United States District Court Chief Judge Walter Herbert Rice granted the Employer's Motion for Summary Judgment, finding that the one year statute of limitations for the enforcement of arbitration awards contained in Section 2711.09 of the Ohio Revised Code was applicable, and that the Union's claim for enforcement of the Arbitrator's award was barred by that applicable one year statute of limitation. Chief Judge Rice's order, (Case Number C-3-01-486), dated April 11, 2003, issued on April 14, 2003.

On July 21, 2003, the law firm currently representing the Union wrote Charging Party Tompkins thanking him for forwarding to the law firm "Your information regarding the events associated with your grievance against Frank W. Schaeffer, Inc."

Union counsel advised Charging Party Tompkins the law firm had reviewed his information, and had concluded the Union's failure to successfully enforce the grievance decision in his favor against the Employer did not constitute a breach of the duty of fair representation.

Union counsel proceeded in his letter to advise Charging Party Tompkins that "While the delays that occurred were regrettable and may have ultimately led to the dismissal of the action to enforce the arbitration award,

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the conduct of the Union and its attorneys does not constitute the type of misconduct the law recognizes as actionable."

Counsel continued in his letter, "The Union's conduct does not constitute anything more than mere negligence."

Union counsel advised Tompkins, "The Union is not in a position to take any further action regarding the grievance against Frank W. Schaeffer, Inc., including payment of any of the damages that may have resulted from your termination."

Finally, Union counsel advised Charging Party Tompkins, in his letter, that if Tompkins disagreed, he was entitled to pursue the matter further by filing an unfair labor practice charge with Region 9 of the National Labor Relations Board, but if he intended to do so, he should not delay.

As noted earlier, Tompkins filed his unfair labor practice charge underlying the case herein on August 5, 2003.

Charging Party Tompkins testified, without dispute, that following the arbitration award he continually sought to have the award enforced, namely by his being

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reinstated and made whole.

Tompkins testified he spoke with then Union attorney Doll, as well as with Union representative Long. Tompkins testified he spoke quite often, from the spring of 1999 until March 2000, with Union representative Long.

Tompkins testified, without contradiction, that he questioned whether there was a one year statute of limitations to seek enforcement against the Employer of his arbitration award.

Tompkins testified then Union attorney Doll told him the one year statute of limitations did not commence to run until the Employer indicated in writing it would not abide by the Arbitrator's award.

Tompkins testified he was told the Employer would not reinstate him until the back pay and lost wages issues had been resolved.

Tompkins testified he asked one of then Union attorneys Kircher, perhaps in December of 2000, about the possibility of a one year statute of limitations for the enforcement of an arbitration award. Attorney Kircher, according to Tompkins, did not think there was such a limitation period.

Tompkins acknowledged on cross-examination that he was told as early as February 2000 that the Union was not going to enforce his arbitration award because the Union did

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not want to spend any more money on his behalf, that the Union had spent too much time, energy, and money pursuing his award, and the Union was refusing to process it any further.

Tompkins acknowledged on cross-examination that from February 25, 2000, until December 2000, he did not seek or speak with the Union about enforcing his arbitration award, even though he had been told the Union was not going to expend any more money or effort to enforce the award.

Tompkins acknowledged he spoke with Union paralegal Monger in December 2000, and as well with then attorney Kircher, and Union executive secretary/treasurer Greg Martin, about his reinstatement, back pay, and the arbitrator's award.

Tompkins testified he also spoke with Union business agent Hinkle during this same time period. Tompkins testified he was advised in the March to April 2001 time frame that attorney Fox had been assigned to his case by the Union.

Tompkins testified he asked attorney Fox about any one year statute of limitations being applicable, and about enforcing the Arbitrator's award. Fox told him, according to Tompkins, that he didn't know about any one year statute of limitations, or any specifics about such.

Tompkins testified that during the May/June 2001

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time frame, he talked with attorney Fox, Union business agent Hinkle about back pay, specifically about pension benefits, mileage reimbursement, and the back pay.

According to Tompkins, attorney Fox disagreed with the amount of back pay Tompkins had calculated, and threw out two years of income, he, Tompkins, was seeking.

Tompkins again asked about the possibility of a one year statute of limitations for the enforcement of an Arbitrator's award. Attorney Fox was to follow through on this and get back with Tompkins.

Thereafter, as earlier referred to, attorney Fox requested of the Employer in writing on October 2, 2001, that Tompkins be reinstated.

Tompkins testified he attempted to find out, after Chief Judge Rice issued his order in April 2003 if the Union was going to appeal that order. Tompkins testified he telephone Union attorney Marcus, and left messages with him. Tompkins spoke with Marcus, perhaps in May 2003.

According to Tompkins, Marcus informed him that it would be a waste of time and money to appeal, that it was unfortunate that someone had dropped the ball, but that attorneys have insurance to protect against such acts. Tompkins testified he asked that if the Union was not going to appeal Judge Rice's order, could he appeal it.

Tompkins testified the first time he realized

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officially that the Union was not going to pursue his arbitration award in some manner, was when the Union advised him in writing on July 21, 2003, by Union counsel Marcus, that the Union was not going to take any further action on his behalf.

Attorney Fox testified that in March 2001, attorney Kircher asked him to work on the case. Attorney Fox said he went over Tompkins' case with him at the Union Hall in March 2001.

Attorney Fox testified Tompkins provided him with certain information the Union did not have, which he was going to use with other information he already had to attempt to work out a settlement of the back pay issue with the Employer.

Attorney Fox testified he and Tompkins had various telephone conversations during this time period. Attorney Fox testified the Union did not feel any statute of limitations was applicable at the time of its Federal District Court lawsuit filed in November 2001.

Those are essentially the facts upon which I will view the parties' positions and apply what I believe to be applicable case law and reach a determination on this case.

Government counsel's position on this case is somewhat simple and straightforward. Government counsel argues that the Union dropped the ball in the handling of

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Tompkins' arbitration award, to such an extent that its conduct would be perfunctory and outside the wide latitude that a union

has in processing grievances, to include seeking the enforcement of arbitration awards.

In that respect, the Government points to a two-year period in which there's no evidence the Union did anything to advance the enforcement of the arbitration award that the Government contends Tompkins was rightfully entitled to.

The Government also contends, in response to the Union's contention that the matter is barred by the statute of limitations applicable in unfair labor practice cases, that this was an ongoing matter, and that Charging Party Tompkins was not put on clear and unequivocal notice that the Union was not going to pursue his matter any further until the middle of 2003.

The Government contends that the perfunctory conduct of the Union was such that the Union has violated Section 8(b)(1)(A) of the Act.

The Union, on the other hand, takes a different view of this case. The Union first argues that this matter should be dismissed in its entirety because the underlying charge filed in this case was not filed in a timely manner under 10(b) of the Act.

The Union made a motion at the conclusion of the Government's case that I dismissed at that time on the

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grounds that there was not a timely charge in this matter. I declined to do so at that time, but without prejudice to the Union renewing that request.

The Union still takes the position that the matter is time barred. The Union also argues that even if the matter is not time barred, that the Complaint should be dismissed on its merits, because the Union had a legitimate reason for its failure to take any action to enforce the arbitration award during all the relevant times herein.

The Union would also argue that there's no evidence of any act or omission by the Union that was improperly motivated.

The Union would argue that there is no evidence of anything more than mere negligence on its part, and the Union argues that the Board and the Courts have held consistently that mere negligence is not enough to make a finding of an unfair labor practice against the Union.

The Union would argue that it made every effort over the extended time to enforce the Arbitrator's award, and that it expended large sums of money in attempting to do so.

Union counsel would point out that the arbitration, itself, cost several thousand dollars, and that just one of the Union's lawyers had billed for in excess of $30,000 in legal fees.

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In summary, the Union's position is twofold, that there was not a timely charge filed to underlie this case, and that the Union had legitimate reasons for each of the actions, or lack of action, that it took.

I shall address the issues in this order. I shall address the statute of limitations issue first.

Section 10(b) of the Act states in pertinent part that, "No Complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Section 10(b) is a statute of limitations and is not jurisdictional in nature. *Paul Mueller Co.*, 337 NLRB 764 (2002).

It is an affirmative defense which must be pleaded, and if not timely raised, is waived. *Federal Management Co.*, 264 NLRB 107 (1982).

The burden of proving an affirmative defense is on the party asserting the defense. *Kelly's Private Care Service*, 289 NLRB 30 (1988).

Although the statute of limitations period begins only when the unfair labor practice occurs, Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice. *Mine Workers Local 17*, 315 NLRB 1052 (1994).

In *Leach Corp.*, 312 NLRB 990 (1993), enforced 54 F.3d 802 (DC Circuit 1995), the Board reaffirmed its

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position that the statute of limitations does not begin to run until "a party has clear and unequivocal notice of a violation of the Act."

Notice, however, may be found even in the absence of actual knowledge if a Charging Party has failed to exercise reasonable diligence, that is, the 10(b) period commences running when the Charging Party either knows of the unfair labor practice, or would have discovered it in the exercise of reasonable diligence. *Oregon Steel Mills*, 291 NLRB 185 at 192 (1988).

The Union places great reliance on the applicability of Section 10(b) on the fact Tompkins acknowledged that between February 25, 2000, when he knew the Union had said they were not going to pursue his matter any further because it cost too much and wasted money and time; that he did nothing between February 25, 2000 and December 2000.

The statute of limitations spelled out in Section 10(b) of the Act would have, during this time, particularly, I guess, after August of this time, would have extinguished any unfair labor practice by Charging Party Tompkins against the Union.

But, the Union, thereafter, resuscitated and/or revived its actions on behalf of Charging Party Tompkins, and as such, life was placed back in Tompkins' unfair labor

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practice charge.

I went at great length to point out the activities that the Union performed on Tompkins' behalf after December of 2000. It is clear that after that time, Tompkins continued to raise with the Union his efforts to have the Union enforce his arbitration award.

The Union brought in attorney Fox for the explicit purpose of seeking enforcement of the award, and the Union continued until July of 2003 to aid, assist, and help Tompkins in the pursuit of his attempting to have the arbitration award enforced. I find that the statute of limitations defense of the Union in this case is without merit.

The Union also raises the point that absent some concealment on their part, that the statute of limitations should be applicable.

With respect to that advancement of the Union, perhaps in August of 2000 there was no concealment at all. Tompkins knew that the Union was not going to pursue his grievance any further, that is, to seek enforcement of his award, but he did nothing between February 25, 2000 and December 2000.

If the Union had lived true to its word and done nothing thereafter, Section 10(b) of the Act would have precluded the advancement of this case. But the Union, as I

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earlier indicated, resuscitated and brought back to life the case in such a manner that Section 10(b) of the Act is not a defense in this case.

I move now to the issue of whether the Union violated its duty of fair representation in its handling of the arbitration award of Arbitrator Murphy.

It is well-settled that a Union which enjoys the status of exclusive collective bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions, *Vaca v. Sipes*, 386 U.S. 171 (1967).

A Union breaches this duty when it arbitrarily ignores a meritorious grievance, or processes it in a perfunctory fashion. *Vaca v. Sipes* at Page 194. See also *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Correspondingly, so long as a Union exercises its discretion in good faith and with honesty of purpose, a collective bargaining representative is granted a wide range of reasonableness in the performance of its representational duties toward the unit employees.

For a Union's actions to be arbitrary, it must be shown that in light of the factual and legal landscape at the time of the Union's actions, the Union's behavior is so far outside a wide range of reasonableness as to be

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irrational. *Airline Pilots v. O'Neill*, 499 U.S. 65 at 67 (19971).

Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. *Ford Motor Company v. Huffman*, 345 U.S. 330 (1993).

Again, however, there comes a point when a Union's action, or its failure to take action, is so unreasonable as to be arbitrary and thus contrary to its fiduciary duties.

A labor organization's arbitrary conduct alone may be sufficient to constitute a violation of its duty of fair representation even without hostile motive of discrimination, and in complete good faith.

A labor organization may pursue a course of action that is so unreasonable and arbitrary as to constitute a breach of its duty of fair representation. A Union, however, has a wide range of reasonableness, so long as they exercise their discretion in good faith.

I am persuaded, after review of the law, that a Union has no higher standard of duty after an arbitration award has been given, than before an arbitration award is given.

An employee has no absolute right to have a grievance processed through any particular stage of the grievance procedure, or to have a grievance taken to

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arbitration. A Union may screen grievances and press only those it concludes will justify the expense and time involved in terms of benefiting the membership at large. *Transit Union Division 822*, 305 NLRB 946 at 948 and 949 (1991).

I should note that a Union must specifically avoid capricious, perfunctory, or arbitrary behavior in the handling of a grievance based on a discharge, which is the industrial equivalent of capital punishment.

I also note that the duty of fair representation encompasses the obligation to provide substantive and procedural due process in any action taken.

Whether a Union breaches its duty of fair representation depends on the facts of each case. Did the Union herein violate its duty, or did it exercise its wide range of discretion in pursuing this grievance to the extent that it did?

I am fully persuaded that the Government has established, by the undisputed testimony herein, that the Union failed in its effort to fairly represent Tompkins in his grievance, and I do so for the following reasons:

First, I note that the Union filed a grievance for

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Tompkins, thus agreeing that the Employer had violated the Collective Bargaining Agreement when it discharged Tompkins. Secondly, the Union pursued to arbitration the discharge of Tompkins and prevailed.

The Union had the duty to go forward and seek the reinstatement award and determine the back pay due. The Union circumvented the award by failing to bring it to its conclusion, that is, the reinstatement of Tompkins with back pay. Had the Union timely done this, the cost to it would have been far less.

Particularly persuasive of the Union's failure to fairly represent Tompkins is the two-year time span in which the Union, it appears, based on the record evidence, took no action with respect to Tompkins' award.

The Union had wide latitude in determining the amount of back pay Tompkins was due without running afoul of the Act. The Union did not have to belaborously go over with Tompkins the amount of his back pay.

The Union could have determined that the back pay was a certain amount, and if Tompkins continued to go on that he was entitled to more, the Union could have said we have reached a reasonable understanding of what your back pay is and we're going to proceed with it, and the Union would not have violated the Act in doing so.

The Union manifestly avoided all real

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efforts to timely resolve the back pay issue and fulfill its arbitrator-directed requirements. The Union's inaction, and its less than full action, with respect to Tompkins' award, crossed the line of rationality to the true detriment of Tompkins.

There's no requirement anywhere that the Union handle the award in a perfect manner. But the evidence leaves room for no other conclusion than that it acted in a perfunctory manner in this case to the detriment of Tompkins.

I reject the Union's argument that an employee has no right to have any grievance processed, let alone taken to arbitration, and that, therefore, the acts that it did in this case far exceeded what it was required to do.

The great fallacy in that argument of the Union is that it took the case, successfully pursued it through arbitration, and then for reasons best known only to the Union, at least not revealed in this record, the Union failed to take any action for a two-year

period of time on the award. It may not do such and then be heard to say we didn't handle your grievance in a perfunctory manner.

The Union also would argue, and I specifically reject its argument, that there must be some showing in the record that there was unlawful motivation in the action that it took. While unlawful motivation is an element in a large

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number of these types of cases, but as the Manworker's case illustrates, a Union's conduct can be so arbitrary, or processed in such a perfunctory manner that it can be concluded that it has violated its duty of fair representation even without any showing that it was ill-motivated.

In fact, this record demonstrates absolutely no evidence of an unlawfully motivated reason why the Union conducted itself in the manner that it did.

I shall direct that the Union make Charging Party Tompkins whole for any losses he may have suffered, and as to any such losses, if there is a dispute, can be determined at the compliance stage of this proceeding.

I would urge the parties that if they find it in their interest to settle this case, that they reach a quick understanding of what constitutes making whole, and not continuously haggle over it so that this case continues for an additional seven years. I believe the case has been ongoing for that length of time. I would urge the parties to still settle this case.

In due time, and due time being usually ten days, the court reporter will provide me a copy of the transcript. I will review those pages of the transcript that constitute my decision.

I will make any necessary corrections thereof and

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indicate what, if any, those corrections were. I may amplify upon my decision, and then I will certify the pages of the transcript that constitute my decision and serve on the parties and the Board that certification.

It is my understanding that the appeal period runs from the time the Board transfers my case to it and says that the case is then continuing before the Board. The Board, when it does such, will specify specifically when any appeal or exceptions to this decision must be timely filed by.

Please go by the Board's rules and regulations and whatever the Board says. I'm just apprising you that, in due time, I will certify my decision and issue it to the parties.

Let me state that it has been a pleasure being in Cincinnati, Ohio. And this trial is closed.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to fairly represent unit employees by allowing the time to lapse for enforcement of arbitral awards.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Sidney J. Tompkins whole, less any net interim earnings, plus interest, for any loss of earnings and other benefits suffered as a result of his discharge by The Schaefer Group, Inc., on November 17, 1997, until such time as The Schaefer Group, Inc. reinstates him or he obtains other substantially equivalent employment elsewhere.

OHIO AND VICINITY REGIONAL COUNCIL OF CARPENTERS